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MAY 28 2004

May 28, 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**BY HAND DELIVERY**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, DC 20002

Re: Notice of Oral *Ex Parte* Presentations – MM Docket No. 04-75

Dear Ms. Dortch:

On May 26, 2004, Linda Gray, President of Max Media of Montana LLC ("Max Media"), appeared in person as an Open Microphone participant in the Commission's Localism Task Force Hearing in Rapid City, South Dakota.

Attached hereto is an original and four copies of her written testimony, which was submitted electronically yesterday evening for the hearing record.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office.

Kindly direct any questions regarding this notice to the undersigned.

Respectfully submitted,

  
Julian L. ShepardNo. of Copies rec'd 076  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

May 27, 2004

**BY ELECTRONIC SUBMISSION**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: RM 10803 - Public Hearing on Broadcast Localism  
in Rapid City, South Dakota

Dear Ms. Dortch:

On May 26, 2004, Linda Gray, President of Max Media of Montana LLC ("Max Media"), appeared in person as an Open Microphone participant in the Commission's Localism Task Force Hearing in Rapid City, South Dakota.

Attached hereto is a formal written submission of her testimony before the Localism Task Force. We ask that this document be added to the hearing record.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

Julian L. Shepard  
Counsel to Max Media of Montana LLC

Attachment

cc: Qualex International (by e-mail)  
Tiera Ford (by e-mail)

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Localism Task Force Hearing  
Rapid City, South Dakota  
May 26, 2004**

**Written Testimony of**

**Ms. Linda Gray  
President, Max Media of Montana LLC**

My name is Linda Gray. I am President of Max Media of Montana LLC ("Max Media"), which owns and operates television stations in Butte, Bozeman, Great Falls, Kalispell, Lewistown and Missoula, Montana.<sup>1</sup> My appearance here today is our acceptance of the invitation from Commissioner Adelstein's staff communicated orally to our Washington FCC counsel in a meeting last Friday. My written testimony includes all of the information provided in my oral remarks at the hearing, plus more specific information and examples including citations to case law and statutes.

As a manager responsible for 6 television stations and approximately 65 employees, I have more than 25 years of experience in the television broadcasting business. I am currently responsible for figuring out how to profitably serve several significant, but smaller, local communities in Montana, and to ensure the economic survival of several television network affiliates at a time when network compensation will end shortly. Also, increasing fragmentation of audiences, increased competition, and generally difficult economic conditions add to these challenges and make small market TV uniquely challenging. One of my biggest concerns as the manager of these Montana stations is the maintenance of a level playing field for all competitors

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<sup>1</sup> These stations are KWYB (TV) in Butte; KWYL-LP in Bozeman; KTGF (TV), Great Falls; KTMF-LP in Kalispell; KTMF-TV, Missoula; and translator station K47DP in Lewistown.

during this period of intense economic pressure, especially while our stations make the digital transition which has added a huge capital investment in our small communities.

Max Media is a committed broadcaster with a history of investing in the improvement of stations it acquires. By way of example, in western Montana, Max Media invested more than two-million dollars in the development of microwave and fiber optic infrastructure to interconnect all of its stations, to better serve its audiences and advertisers. All of our full power stations have complied with the DTV construction deadlines. We started local news at stations where previously there had been no local news offered on 4 of the stations we acquired. In addition, we re-established a local news service at our station in Great Falls, where the previous owner had discontinued it.

As broadcasters in Montana, we take pride in our independence. We are accountable for our own successes and failures. We do, however, need to do business and compete in an environment where the playing field is level, especially in a small community when it comes to access to network programming. I do not know of one single TV station in a market smaller than 100 that is not affiliated with a network. Without access to network programming, a station cannot pay for only syndicated product **and** produce **local** programming. I am here tonight to emphasize the continued importance of a certain Commission rule on competition and localism – specifically the network territorial exclusivity rule – which is now framed for review by the Commission in a Request for Expedited Declaratory Ruling filed by Max Media in February, 2004. The Request is now an active proceeding and comments and reply comments on the Request have been received by the Commission.

I am not here to resubmit orally that which Max Media has already filed with the Commission. However, I do think it is appropriate to give some background on the rule and to

present the issues the Commission now faces. This rule has served our industry well for many years and the **certainty** of the rule is the foundation we rely on when bargaining for network programming. It is important that the FCC maintain the effectiveness of the network territorial exclusivity rule. Local news service and other programming which benefits the local community is structured around a base of network programs that are viewed at a sufficient level to sell enough advertising to pay for the things TV stations do for their local communities.

The current network territorial exclusivity rule was adopted by the Commission to ensure that local stations have a fair opportunity to acquire network programming by limiting the amount of territorial exclusivity stations licensed to other (or neighboring) communities can obtain from a television network. In other words, the Commission recognized the importance of network programming to its grand allocation scheme under Section 307(b) of the Communications Act of 1934. This section of the Act requires the distribution of licenses, frequencies, hours of operation and power among the several States and communities by the Commission, to be fair, efficient and equitable. The Commission understood this mandate to mean that each local community was worthy of consideration for licensed service, regardless of size, to the extent there were applicants desiring to invest to serve these communities.

The network territorial exclusivity rule became an integral part of the fabric of localism. In pertinent part, the rule provides, "No license shall be granted to a television broadcast station having any contract, arrangement, or **understanding, express or implied**, with a network organization [ . . . ] which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization."

Fortunately, this rule has served the industry well so there have been very few Commission cases interpreting this rule. The rule has been honored by networks and their

affiliates over the past 50 years – the cases interpreting this rule have only defined the scope of what is NOT protected by the rule. For example, the Commission clarified that the rule does not entitle any particular station to receive network programming, and that the FCC will not ordinarily interfere with the business judgments of networks. Clearly, when acting independently, a network – without the influence or involvement of a television network affiliate or affiliates – is not obligated to affiliate or maintain an affiliation with a station in any given community. Moreover, the rule does not prohibit a station from acquiring network territorial exclusivity against ANY other station in its community of license.<sup>2</sup>

The only clear guidance on the meaning of this rule's proscription is found in the Report and Order adopted the rule by amendment in 1955. The circumstances and concerns that led the Commission to amend the rule in 1955 remain valid concerns today. The Commission described those circumstances and the importance of the 1955 amendment, as follows:

At this stage in the development of the television industry, ***network programming is essential to the profitable operation of most stations; and, in many instances, its availability may be determinative of a station's ability to survive and furnish a needed television service to the public.*** The obtaining of network programs is such a vital and valuable asset to stations that we believe maximum opportunity should be given to all stations to compete for network programming, and that any of our Rules which might operate to restrain competition among stations for network programming should be kept to the minimum required to protect the public interest and to insure good program service to the public. [Emphasis added.]<sup>3</sup>

To date, the FCC has not enforced the rule in any reported decision. The time is ripe, however, for the Commission to: (1) clarify the meaning of this rule; (2) state with clarity

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<sup>2</sup> Letter to Eugene F. Mullin and Nathaniel F. Emmons, 10 FCC Rcd 4416, 78 RR 2d 88 (1995).

<sup>3</sup> *Id.* at ¶ 9.

the scope of protection afforded by the rule; (3) most importantly, perhaps, clarify the burden of proof necessary to designate a violation of this rule for a license revocation hearing; and (4) where a violation of the rule is established, clarify the Commission's remedy for the harm. These issues are framed for Commission decision in MM Docket No. 04-75, which was initiated by Max Media's Request. It is important to recognize that by providing such needed clarity in this rule, the Commission would not lock itself into an inflexible position regarding the dynamic and fast-changing environment of television broadcasting. Indeed, the Commission would provide much-needed guidance to all licensees regarding their dealings with network organizations at a time when the potential for violations of this rule are increasing.

Commission enforcement of this rule is very important to me and every broadcaster who relies on the certainty that he is not in a constant defensive state of protecting his territory from encroachment by another station of the same network from another adjacent or neighboring market. Without this continued stability in our industry, localism as envisioned in the Commission's policy is not possible in my opinion. Any effort to dilute or eviscerate this rule and *de facto* change the protection guaranteed a local broadcaster should be met with strong resistance by the Commission. Right now, our station in Great Falls, Montana is suffering from the exact kind of anti-competitive behavior that the network territorial exclusivity rule was designed to prohibit. A network affiliated station in Helena, Montana in an adjacent market to Great Falls has bargained with a network organization to expand its territorial exclusivity at the expense of the network affiliation of KTGF, Great Falls, Montana. It has all been described in detail in Max Media's formal filings with the Commission.

Local news service is very expensive in markets like Rapid City because advertising revenues are not as plentiful as in a market like Memphis. As a result, stations in

markets like mine must have reliable network relationships – which are far more likely to exist, if the territorial exclusivity limits are enforced. Local news commitments are not expenses that can be turned off like a light bulb. If you lose all of the station’s programming supplied by a network, continued funding of local program production is not realistic. Without a level playing field for the acquisition of network programming – in the form of a reasonable expectation of non-interference in such relationships by stations licensed to neighboring communities -- broadcasters in small communities simply will not be able to make new investments in localism.

How much proof and what type of proof should the Commission require for a station such as KTGF to invoke the protection of the Commission’s network territorial exclusivity rule? The Commission must remain mindful that objective, documentary evidence of such violations is difficult to come by. Violations occur and are not necessarily documented in writing between a station owner and a network organization. If such written communications exist, they are not intended to be discovered by any third party. Fortunately, in the case of KTGF, a third party brought to our attention a letter from a network organization that was marked and meant to remain confidential (and is marked as such), which described a violation of the network territorial exclusivity rule. I hope the FCC will look at this record carefully as it reaffirms its intent that stations remain economically healthy so that local service remains a reality and not just a policy objective.

A network organization can always claim that its decision to terminate a network affiliate is an “independent” business judgment. In fact, a network would be motivated to claim just that in order to minimize its exposure to civil and criminal liability for violations of the anti-trust laws and FCC rules. Consequently, if the Commission requires a station to prove the negative – that the network’s decision was NOT independent, then the Commission would



impose an utterly impossible burden of proof and thereby eviscerate the rule, rendering it practically unenforceable.

The plain language of the network territorial exclusivity rule does not require proof of CAUSATION. All that is required is a showing that a station has an arrangement with a network organization that “HINDERS” a station licensed to another community from obtaining the network’s programs. The word “hinder” does not mean that the station’s arrangement must ultimately result in a blocking of the program flow. Merriam-Webster’s Collegiate Dictionary (10<sup>th</sup> Ed.) defines the verb “hinder” “to make slow or difficult the progress of . . .” Therefore, a station can “hinder” without ultimately blocking access to the programs and, under the plain meaning of the rule, the station with such an arrangement with a network organization would be in violation of the rule.

If an arrangement is made by a broadcaster in an adjacent market, or a separate market anywhere, to HINDER or PREVENT the flow of programming to a station – that is a violation of the rule. Accordingly, where a local broadcaster produces evidence in the form of a letter from the network organization to a station owner (describing an arrangement involving the termination of another station’s network affiliation in favor of expanded territorial exclusivity for stations licensed to neighboring communities), then that evidence should be more than sufficient to trigger enforcement of the rule. If the station owner who receives such a letter from a network truly had nothing to do with the network’s decision, then the station owner should be able to demonstrate that fact. Hopefully, the penalty for such violations will be substantial enough to discourage future violations by others.

As this Commission has focused on the importance of public service and localism, and has invested the time and resources in conducting hearings such as this, we

encourage you as Commissioners to take a very close look at the proceeding that I have talked about here tonight and press your fellow Commissioners to act with dispatch on Max Media's Request. Without network programming available per the enforcement of rules on which we all rely, the operation and improvement of stations in rural and smaller markets is not possible. With a reliable core of quality programming from a network, Max Media of Montana and other small market stations can then focus its efforts on producing local content geared to the needs of the communities to which its stations are licensed. The arrangement I described tonight between a station group and the network which prevents and hinders Max Media's Great Falls station from continuing its network affiliation, and, thereby, from obtaining the network's programming inflicts *precisely* the harm that the territorial exclusivity limits was intended to prevent. The facts of this situation are clearly described and supported by the filings before the Commission. We ask the FCC for a decision now that the record is complete.

Thank you for the opportunity to testify here this evening as local market, free television for all those in America who cannot afford to subscribe to cable, or satellite TV, is at the core of the news and entertainment that serves the public.